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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

[redacted]

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM,
Appellant

v.

NEW LEFT EDUCATION PROJECT, ET AL.,
Appellees

Appeal From The United States District Court
For The Western District of Texas

BRIEF FOR APPELLANT

Of Counsel:

RICHARD C. GIBSON
Law Office Director
University of Texas System

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

ALFRED WALKER
Executive Assistant Attorney General

J. C. DAVIS
Assistant Attorney General

PAT BAILEY
Assistant Attorney General

JAMES C. McCOY
Assistant Attorney General

W. O. SHULTZ II
Assistant Attorney General

Counsel for Appellant
P. O. Box 12548, Capitol Station
Austin, Texas 78711

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NO. 1100

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Appellant

v.

NEW LEFT EDUCATION PROJECT, ET AL.,

Appellees

Appeal From The United States District Court
For The Western District of Texas

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the district court appears in the Appendix at page 164 and has not been reported.

JURISDICTION

Regents invoke the jurisdiction conferred upon this Court by 28 U.S.C. §1253 to review by direct appeal an order granting a permanent injunction in a civil action required by Act of Congress to be heard and determined by a three-judge district court.

The judgment was entered on September 9, 1970 (A. 2, 177). Since it was a final adjudication on the merits of the issues presented, Regents filed Notice of Appeal in the district court on October 30, 1970 (A. 2), which was within the 60-day period prescribed by 28 U.S.C.

§2101(b), and in compliance with Rule 11(3) of this Court. On December 14, 1970, Regents complied with the requirements of Rule 13 of this Court. Thereafter, this Court by its Order of March 1, 1971, postponed further consideration of the question of jurisdiction until the hearing of the case on the merits. — U.S. —, 91 S.Ct. 939, 28 L.Ed.2d 214. The foregoing clearly demonstrates the timeliness of the procedural steps necessary to invoke the jurisdiction of this Court.

There is no question that the Regents appear before this Court burdened with the restraints of a permanent injunctive order of the court below (A. 173, 176). That much is clear. Therefore, aside from the timeliness of procedural niceties, the ultimate question of jurisdiction under 28 U.S.C. §1253 depends upon whether this case is one that was required by Act of Congress to be heard by a three-judge district court. *Flast v. Cohen,* 392 U.S. 83 (1968); *Zemel v. Rusk,* 381 U.S. 1 (1965); *Florida Lime & Avocado Growers v. Jacobsen,* 362 U.S. 73 (1960); *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368 (1948). However, since the judgment entered (A. 176) was signed by only the district judge in whose court this case was originally filed, we must, at the threshold, dispose of the question of whether this was the judgment of a three-judge court. Upon the suggestion of Regents that this case was required by 28 U.S.C. §2281 to be heard and determined by a district court of three judges (A. 15), the Chief Judge of the Court of Appeals for the Fifth Circuit, acting pursuant to 28 U.S.C. §2284, designated a three-judge district court to hear and determine this cause (A. 18). The district judge in whose court this case was originally filed, together with another district judge and a circuit judge were designated as the three-judge district court (A. 18). By an order entered on December

17, 1969, signed by all three judges, it was determined that this case was required to be heard and determined by a three-judge court (A. 41). By a memorandum opinion dated September 3, 1970, signed by all three judges, the court found that the regulations in question were unconstitutional and enjoined Regents from enforcing them (A. 164). The judgment signed by the single judge recites that this case was heard by a three-judge court and that the judgment was being entered in accordance with that court's opinion of September 3, 1970 (A. 176). Under these circumstances, *Dohany v. Rogers,* 281 U.S. 362 (1929), is dispositive of the question of whether the judgment signed by a single judge is the judgment of a three-judge district court. In *Dohany* the Court held that where the record showed that the case was heard by a three-judge district court as required by 28 U.S.C. §2281, a judgment signed by only one of those judges was nonetheless the judgment of the three-judge court because the judgment, ". . . on its face purports to be by the district court sitting in the cause . . . ." and ". . . there is ample authorization and sanction for the decree in the opinion signed by two of the judges and the concurring opinion of the third." Id., at 369-370. Under similar circumstances Mr. Justice Harlan, sitting as Circuit Justice, came to the same conclusion in *Breswick & Co. v. United States,* 100 L.Ed. 1510, 1515 (1955). See also *Cumberland T. & T. Co. v. Louisiana Pub. Serv. Comm.,* 260 U.S. 212, 218 (1922); cf. *Ayshire Collieries Corp. v. United States,* 331 U.S. 132, 138 (1946). The judgment in this case falls within that rule.

This is not a case like *Mengelkoch v. Industrial Welfare Comm.,* 393 U.S. 83 (1968), and *Wilson v. City of Port Lavaca,* 391 U.S. 352 (1968), where the judgment of the single judge was entered after the three-

judge court had determined that the case was not required to be heard by such a court.

Aside from the fact that the record in this case presents a judgment which falls within the rule of *Dohany,* the memorandum opinion of the three-judge court in this case (A. 164), signed by all three judges on September 3, 1970, contains the following recitation, (A. 173):

> "It is therefore ADJUDGED that Sections 6.11 and 6.12 of the Regents Rules and Regulations are unconstitutional; it is further ORDERED that the Regents are hereby ENJOINED from enforcing either section."

This language is sufficient to constitute a judgment of the three-judge court for purposes of appeal. See *United States v. Schaefer Brewing Co.,* 356 U.S. 227 (1958); *Burns v. Ohio,* 360 U.S. 252 (1959); *United States v. Hark,* 320 U.S. 531 (1943). Considering it as such, the procedural steps taken by Regents present a timely appeal. Surely it would serve no useful purpose, either as a matter of procedure or for the ends of justice, to send this case back to the three-judge district court in order for two judges of that court to perform the perfunctory task of affixing their signatures to a judgment that clearly reflects that it is in accordance with the opinion signed by all members of the court.

Passing now to the question of whether this case is one that was required by Act of Congress to be "heard and determined by a district court of three judges." The Plaintiffs below brought this action for the purpose of obtaining an injunction prohibiting the Regents from enforcing certain of its rules and regulations upon the ground that such rules and regulations unconstitutionally impinge upon First Amendment

rights (A. 9, 29-30). Regents contend that the provisions of 28 U.S.C. §2281 required this case to be heard and determined by a three-judge district court. That section reads as follows:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The Board of Regents of The University of Texas System was created by the Legislature as the governing body of The University. Articles 2584, 2584a, Vernon's Civil Statutes. It is a state board and its members are "officers of the state." *Splawn v. Woddard,* 287 S.W. 677 (Tex.Civ.App. 1926, no writ). Article 2585, Vernon's Texas Civil Statutes, imposes upon the Regents the duty to ". . . enact such by-laws, rules and regulations as may be necessary for the successful management and government of the University; . . ." The rules and regulations of the Regents are of the same force and effect as statutes duly enacted by the Legislature. *Foley v. Benedict,* 122 Tex. 193, 55 S.W.2d 805 (1932). The rules and regulations of the Regents are not statutes that are merely local in nature, as was the case in *Moody v. Flowers,* 387 U.S. 97 (1967), and *Rorich v. Board of Com'rs of Everglades Drainage Dist.,* 307 U.S. 208 (1939); to the contrary, they extend to numerous campuses, schools and facilities located throughout the State of Texas. See e.g.: Articles 2585c, 2585d, 2603e, 2603f-1, 2603f-2, 2603f-3, 2603i, 2606b,

2606c, 2606c-1, 2606c-1.1, 2606c-2, 2606c-2.1, 2606c-3, 2606c-3.1, 2606c-4, 2606d, 2620a, 2633, Vernon's Texas Civil Statutes. They are clearly statewide in character and application. Therefore, whether we accept the decisions of the Texas courts holding the Regents to be "officers of the state" and equating their rules and regulations with "legislative enactments," or merely view the rules and regulations as *orders* and the Regents as *an administrative board or commission acting under State statutes,* 28 U.S.C. §2281 requires that a request for an injunction restraining the Regents in the execution of their rules and regulations be heard and determined by a three-judge district court. *Phillips v. United States,* 312 U.S. 246 (1941); *Sailors v. Kent Board of Education,* 387 U.S. 105 (1967); *Sigma Chi Fraternity v. Regents of University of Colorado,* 258 F.Supp. 515 (D.C. Colo. 1966); *Clarke v. Redeker,* 259 F.Supp. 117 (S.D. Iowa 1966); *Webb v. State University of New York,* 125 F.Supp. 910 (N.D. N.Y. 1954); *Stacy v. Williams,* 306 F.Supp. 963 (N.D. Minn., 1969); *Gilmore v. Lynch,* 400 F.2d 228 (9th Cir. 1968); *Williams v. McNair,* 316 F.Supp. 134 (D.C. S.C. 1970); *Sellers v. Regents of University of California,* 432 F.2d 493 (9th Cir. 1970).

This Court has jurisdiction to review the judgment in this case under 28 U.S.C. §1253.

REGULATION INVOLVED

Acting pursuant to the powers conferred by Article 2585, Vernon's Texas Civil Statutes, the Regents from time to time have promulgated and enforced rules and regulations for the government of The University of Texas System. These rules and regulations have the force and effect of legislative enactments. *Foley v. Benedict,* 122 Tex. 193, 55 S.W.2d 805 (1932). The regulation in question is designated as *Section 6.11, Chap-*

ter VI, Part 1, Rules and Regulations of the Board of Regents of The University of Texas System. It reads as follows:

"6.11 Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, except as otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;

(2) the sale of any authorized student publication or any publication authorized by an agency of a component institution;

(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;

(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and

(5) any commercial solicitation necessary for the normal administration, operation, and

maintenance of any component institution is an educational institution."

QUESTIONS PRESENTED

1. A part of the federal class Plaintiffs were Defendants in a state court action brought by the Regents to enforce their solicitation Rules 6.11 and 6.12 at the time this class action was filed in the court below. If that part of the federal class Plaintiffs raise and litigate the constitutionality of those rules in the state court, is the state court judgment binding upon the other federal court class Plaintiffs when plead by the Regents as a bar in the court below?

2. In view of the pending state court action, was the judgment of the court below precluded by either 28 U.S.C. §2283 or the absence of facts showing that Plaintiffs in the court below would suffer great and immediate irreparable injury as a result of the Regents' action to enforce its rules in state court?

3. Whether Section 6.11 of the Regents' Rules imposes an impermissible burden upon the right of free speech and association secured by the First Amendment when applied to property owned by the State and dedicated to educational purposes?

STATEMENT

The Regents brought an action in the 167th District Court of Travis County, Texas, to enjoin New Left Education Project, Radical Media Project, Clyde Alan Locklear, Nancy Sweeny, James Caldwell, Patricia Cuney, David Waddington, Larry Neil Winn and other persons of a class, from selling or distributing for consideration or otherwise a newspaper known as "The Rag" and from making any other commercial or noncommercial solicitation on the campus of The University of Texas at Austin, except in compliance

with Section 6.11 and 6.12 of the Regents' Rules. Thereafter, the Defendants in the state court action filed this action against the Regents in the United States District Court, Western District of Texas (A. 1). The Complaint (A. 3) set forth the fact that the federal Plaintiffs were Defendants in the pending state court action (A. 3,4,5,7); it alleged that federal Plaintiffs brought the action individually and on behalf of a class under Rule 23, F.R.C.P. (A. 4); it alleged that the solicitation rules which Regents sought to enforce impinged upon the First Amendment rights of federal Plaintiffs and the class they represent (A. 4,6,7,9); it requested declaratory judgment that the rules in question are unconstitutional, and asked for injunction restraining Regents from further attempting to enforce the rules in question, either by disciplinary proceedings or "by maintenance of state court injunctive action" (A. 9). Regents' Answer to the federal action denied the material allegations concerning the constitutionality of the rules; it alleged that the federal court was prohibited by 28 U.S.C. §2283 from granting the requested injunctive relief and that declaratory relief should be denied because all of the issues raised could be litigated in the pending state court action (A. 10).

Federal Plaintiffs then filed a Motion for Leave to Amend (A. 20) which was opposed by Regents (A. 33). The Amended Complaint (A.22) joined as parties Plaintiff The Young Democratic Club, Emma Leigh Washburn, Janis Buchanan, Carl Roberts, James R. Waddington, Seth B. Cox, Emily Calhoun, Richard Streeter, Marilyn Turboff, Paula Beaird, Robert Claymay, Lyssa Clayman and Barbara Hines, still alleging that Plaintiffs were representative of a class and requesting the same relief as the Original Complaint.

By an order dated December 17, 1969, (A. 41) the three-judge court granted leave to amend and granted joinder of the parties Plaintiff under Rule 20(a), F. R.C.P., on the finding that the claims of all parties Plaintiff present common questions of law and fact and arise out of the same series of occurrences. That order further recites that the claims of the original federal Plaintiffs and the Plaintiffs joined by the Amended Complaint present *different procedural issues* and severs the class into two categories: "Part A" consisting of the federal Plaintiffs who are state court Defendants and "Part B" consisting of the remainder of the federal Plaintiffs. The court then proceeded to express its faith in the ability of the state court to resolve the constitutional issues relating to the validity of Regents' Rules 6.11 and 6.12; declined the "Part A" Plaintiffs' request for injunctive relief against the state court action and their request for declaratory judgment as to the constitutionality of Regents' Rules 6.11 and 6.12 and dismissed the "Part A" portion of the Amended Complaint. The order of the court then declared that the "Part B" Plaintiffs would be allowed to challenge the constitutionality of Regents' Rules 6.11 and 6.12 and that their request for declaratory and injunctive relief would be considered in further proceedings before the court.

On January 8, 1970, the Young Socialist Alliance filed a Motion to Intervene as Party Plaintiff in the court below (A. 44), alleging that it was a member of the class of Plaintiffs described in the First Amended Complaint and adopting all material allegations and prayers of that Complaint. By its order of February 10, 1970, the court below granted the Young Socialist Alliance leave to intervene (A. 48).

The state court action came on to be heard upon the

Regents' application for temporary injunction on the 25th day of February, 1970. The state court Defendants ("Part A" Plaintiffs in the federal court) appeared by and through the same counsel who represented all Plaintiffs in the federal court action, presented evidence and argued to the state court their contention that Regents' Rules 6.11 and 6.12 violated their First Amendment rights (A. 78-79). The constitutional issues were fully raised by the pleadings of the state court Defendants (A. 85, 115). On February 26, 1970, the state court entered its judgment (A. 80, 110) finding Regents' Rules 6.11 and 6.12 to be reasonable regulation of conduct on campus; finding that they do not abridge First Amendment rights; and granting a temporary injunction restraining the state court Defendants and all persons acting in concert with them from selling "The Rag" in violation of said rules.

The "Part B" federal court Plaintiffs then filed a Motion for Summary Judgment (A. 56) in the court below on March 10, 1970. Regents filed several Affidavits in Opposition to Motion for Summary Judgment (A. 73,76,78,152,157,158). Regents also filed a Second Amended Answer (A. 100) to bring forward its contentions with regard to 28 U.S.C. §2283 and the propriety of declaratory relief, denying the material allegations of the Amended Complaint, specifically pleading the fact of the state court judgment and its effect as res judicata and bar upon the issues and parties before the federal court (A. 105-108). Certified copies of the state court pleadings and judgment were attached to the Regents' Second Amended Complaint (A. 109-130) and to the Affidavit of Regents' attorney (A. 78-99). The state court judgment was also made the basis of a Motion to Dismiss filed by the Regents (A. 146).

On June 26, 1970, the "Part B" federal court Plaintiffs' Motion for Summary Judgment and the Regents' Motion to Dismiss came on to be heard before the court below. The following facts were before that court by way of stipulation, interrogatory and affidavit.

The campus at The University of Texas at Austin covers approximately 262 acres. More than 36,000 students are enrolled at this component institution of the System and over 7,000 persons are employed on the campus (A. 152, 162).

A free speech area of approximately 17,000 square feet is maintained on the Austin campus immediately adjacent to the student union building where persons may make speeches and hold demonstrations without prior administrative approval (A. 158, 162).

The Federal Plaintiffs make no contention that the Regents' Rules 6.11 and 6.12 have been applied or enforced in a discriminatory manner (A. 163).

From time to time there are as many as fifteen booths located on the west mall of the Austin campus for purposes of distributing literature in conformity with University rules (A. 160). During the period from January through March, 1970, those booths were authorized and maintained for the various purposes shown in the answers to interrogatories No. 7 and No. 8 (A. 137-139) in conformity with the institutional rules then in effect on the Austin campus as set forth in the Appendix at 142-145. Also various signs were posted on the campus. The purpose of the signs and the student organization posting them are listed (A. 140-141) in response to Plaintiffs' interrogatory No. 9. All were authorized under institutional rules then in effect on the campus at Austin, subject to Regents'

Rules 6.11 and 6.12, as indicated by footnoting in the institutional rules (A. 142-145).

In conformity with Regents' Rule 6.11(2), student publications printed by Texas Student Publications, Inc., an agency of The University of Texas at Austin and subject to the ultimate control of the Regents (A. 154), are sold and distributed on the Austin campus. Those that are sold or distributed from booths or stands are as follows:

1. *Daily Texan*—the Austin campus newspaper. Distributed from unattended stands at the entrances to nine buildings located on the campus (A. 131, 160).

2. *The Riata*—a literary magazine containing writings and art contributed by students in those fields. Sold from four booths (one on each side of the campus), twice a year for one day (A. 131, 161).

3. *Student Directory*—a listing of the names, addresses and telephone numbers of the student body at Austin. Sold once a year from booths at the same locations as *The Riata* (A. 131, 161).

Additional authorized student publications are: *Cactus*—the Austin campus yearbook; *Peregrinus*—the Austin campus law school yearbook; *Texas Engineering and Science Magazine*—carries articles on current engineering and science research and ideas; *Student Activities Handbook*—giving general information about The University (A. 131-132). No facts were developed as to how or when these publications are sold or distributed.

Also pursuant to Regents' Rule 6.11(2), the various colleges and departments at the Austin campus

sell educational pamphlets, journals and books dealing with the departmental subject (A. 132). These publications are not sold from booths upon the malls of the Austin campus, but are sold either through subscription or at the office of the particular college or department. They fall within the category of publications "authorized by an agency of a component institution" (A. 132, 154).

Commercial sales permitted pursuant to Regents' Rule 6.11(3) consist of vending machines which dispense food and drinks, placed in designated places in the campus buildings; coin operated washing machines and dryers in the various dormitories; and food and drinks provided at athletic contests (A. 155). Also other sales of a similar nature listed in response to Plaintiffs' interrogatory No. 3 (A. 132-134).

Pursuant to Regents' Rule 6.11(4), the sale of newspapers and other publications by vending machine is permitted in five accessible and separated areas on the Austin campus, as listed (A. 134) in response to Plaintiffs' interrogatory No. 4 (A. 71). At least 12 newspapers, including "The Rag" at one location, are sold at these designated areas (A. 132). The Young Socialist Alliance has never asked for permission to sell literature or publications at these locations (A. 162). Any newspaper or publication is entitled to be sold from vending machines at these locations upon applying to the appropriate administrative official (A. 155).

Sales of various toiletries, athletic equipment, educational material, laboratory equipment, workbooks, school supplies, office stationery, prepared food, and articles normally consumed in the course of academic work are sold by The University at appropriate places

pursuant to Regents' Rule 6.11(5). (A. 134-135; A. 155-156).

The rationale for the five categories of commercial solocitation excepted from the general application of Regents' Rule 6.11 is that they are of sufficient importance and service to the students and faculty as to be permitted (A. 156).

Sandra Gay Ellis, a student at The University of Texas at Austin, testified by affidavit that the manner in which persons selling "The Rag" on the Austin campus conducted their solicitations was extremely irritating to her and that the commercial solicitation rule served the purpose of keeping students on campus from being bothered by obnoxious solicitors (A. 76).

Frank C. Erwin, Jr., Chairman of the Board of Regents, testified by affidavit that he had received complaints from persons who were offended by the solicitation tactics of persons selling "The Rag" (A. 153).

Jack Holland, Assistant Vice-Chancellor for Student Affairs (former Assistant Dean of Men, Dean of Men, and Dean of Students at the Austin campus) testified by affidavit that he had received complaints from faculty, students and employees who had been approached on the Austin campus by persons selling magazines, newspapers, or encyclopedias and had been annoyed by such persons (A. 157).

Edwin B. Price, Assistant Dean of Students at The University of Texas at Austin, testified by affidavit that laboratory instructors had reported to him that persons soliciting the sale of newspapers and magazines in the laboratories and laboratory buildings were disrupting laboratory classes. He also received complaints from professors who said that their classes were disrupted because students were reading pam-

phlets and circulars that had been left in the classrooms for the purpose of soliciting subscriptions to magazines. He further testified that he had received reports that newspaper and magazine salesmen were annoying residents of dormitories located on the Austin campus (A. 158). He also testified that the malls of the campus at Austin have not been maintained or used as traditional free speech areas, but that a free speech area was maintained adjacent to the student union building (A. 149).

At the conclusion of the hearing before the court below on June 26, 1970, the court took the matters presented under consideration and on September 3, 1970, rendered a memorandum opinion (A. 164-175). The court concluded that the state court judgment was not res judicata as to the constitutionality of Regents' Rules 6.11 and 6.12, and proceeded to find that although the Regents interest in preventing substantial disorder or material disruption of classroom activity was a "compelling" state interest which would justify "*some reasonable regulation,*" nonetheless the questioned rules "broadly stifle fundamental personal liberties when the end can be more narrowly achieved" and are therefore "unconstitutionally overbroad" (A. 170-171). The court further found that both rules are invalid because they "vest standardless discretion in the institutional head or his agency-delegate to grant or withhold exercise of first amendment rights" (A. 173). Judgment was entered enjoining the Regents, their agents, servants, employees, attorneys and all other persons in active concert or participation with them from further enforcement of such rules (A. 177).

SUMMARY OF ARGUMENT

I.

Upon the basis of their own allegations and argu-

ments, the court below found that "Part A" and "Part B" Plantiffs to that cause were members of a class whose challenge to the constitutionality of Regents' solicitation rules present common questions of law and fact arising out of the same series of occurrences. If "Part B" Plaintiffs had not been allowed to join in this action, it is clear that once "Part A" Plaintiffs had freely and unreservedly litigated the constitutionality of the Regents' Rules in the state court action they could not return to federal court to relitigate those same issues. *England v. Louisiana Medical Examiners,* 375 U.S. 411 (1964). Reason dictates that because of the avowed sameness of "Part A" and "Part B" Plaintiffs' interest in all questions of law and fact, "Part B" Plaintiffs were also precluded from relitigating in the court below those issues decided by the state court. To conclude otherwise would clearly circumvent the principles and reasoning expressed in *England* by allowing "Part A" to return to federal court in the guise of "Part B" to relitigate the same issues.

II.

While ordinarily a temporary injunction may not be the basis of a plea of res judicata or bar, under Texas court decisions a temporary injunction can be final for purposes of res judicata where the ultimate issues forming the basis of the action or defense are put in issue and decided by the court. *Wilson v. Abilene Indp. Sch. Dist.,* 204 S.W.2d 407 (Tex.Civ.App. 1947, error ref. n.r.e.). "Part A" and "Part B" Plaintiffs being part and parcel of the same class, with no conflicting interest and presenting the same challenge to the Regents' Rules through a common counsel, all were bound by the state court judgment on the constitutional issues relating to Regents' Rules 6.11 and 6.12,

Hansberry v. Lee, 311 U.S. 32 (1940); *Gart v. Cole,* 263 F.2d 244 (2nd Cir. 1959). The court below was required by the full-faith-and-credit clause to give the state court judgment the same res judicata effect that it was entitled to in state court. *Oklahoma Packing Co. v. Oklahoma G. & E. Co.,* 309 U.S. 4 (1939).

III.

The provisions of 28 U.S.C. §2283 prohibit a federal court from granting an injunction to stay state court proceedings. Although the injunction entered by the court below was directed to the Regents, their agents and counsel, it effectively prohibited ther from taking any steps in the state court to either make the temporary injunction permanent or enforce the temporary injunctiou. This brought it within the prohibition of § 2283. *Atlantic Coast Line R. Co. v. Engineers,* 398 U.S. 281 (1970). Unless a case comes within one of the stated exceptions in §2283, state court proceedings must be allowed to proceed unimpaired by the lower federal courts, leaving the correction of any error up to the state appellate courts and the United States Supreme Court. The injunction entered by the court below does not come within any of the exceptions to §2283, and, being powerless to enlarge upon those exceptions, the injunction should not have been entered. *Atlantic Coast Line R. Co. v. Engineers, supra; Amalgamated Clothing Workers v. Richman Brothers,* 348 U.S. 511 (1954). Nor can the Declaratory Judgment Act be used as a vehicle to circumvent the prohibition of §2283 by the court granting such a judgment and then entering an injunction to "protect or effectuate" the declaratory judgment under §2283. *Samuels v. Mackell,* 400 U.S. —, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971). Consequently, that relief was also unauthorized.

IV.

On the basis that comity and the principles of "Our Federalism" require respect for the proposition that our system will fare best if state courts are left free to perform their functions, this Court has held that wholly aside from the prohibition of 28 U.S.C. §2283, a federal court is not authorized to grant an injunction to stay a state court criminal prosecution or grant a declaratory injunction holding the statute under which that prosecution is proceeding unconstitutional except upon a showing that both great and immediate irreparable injury will occur as a result of the prosecution. *Younger v. Harris,* 400 U.S. —, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Samuels v. Mackell,* 400 U.S. —, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); *Perez v. Ledesma,* 400 U.S. —, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971). The mere fact that the statute under which the prosecution is brought has a "chilling effect" upon First Amendment rights or may be unconstitutional upon its face is not sufficient to warrant interference with the state action taken under it. In the absence of bad faith prosecution or harrassment, it must be shown that one's federally protected right cannot be vindicated by the defense of a single criminal prosecution. *Younger v. Harris, supra.* There is no reason in logic or law why these same principles should not apply to the power of a federal court to grant injunctive or declaratory relief where the pending state court action is a civil suit to enforce the provisions of a state statute or regulation. Since the Plaintiffs in the court below failed to present facts which would satisfy the foregoing criteria, the court below was unauthorized to grant injunctive and declaratory relief which interfered with the pending state court action.

V.

Since the campus at Austin, and other institutions under the control of Regents, is dedicated to use for educational purposes, Regents are authorized to enact reasonable rules and regulations necessary to preserve the use of its property for that purpose. *Adderly v. Florida,* 385 U.S. 39 (1967); *Tinker v. Des Moines Community School Dist.,* 393 U.S. 503 (1969). Conduct which is mixed with elements of free speech may be regulated as to time, manner and place in order to further an important governmental interest if the regulation is unrelated to suppression of free expression, and the restriction on those freedoms is incidental. Because past and continuing experience showed that unrestricted solicitation of the sale of newspapers and magazines upon the Austin campus disrupted the routine of classrooms and laboratories, resulted in the anoyance of students, faculty and employees both on campus malls and in dormitories, restricting sales of such publications from vending machines located in specified areas of the campus in order to preserve the orderly and efficient operation of the educational process is not an unconstitutional restriction of First Amendment freedoms. *Breard v. Alexandria,* 341 U.S. 622 (1950); *Kuszynski v. City of Oakland,* 322 F. Supp. 689 (N.D. Calif. 1971). Absent any showing that the method selected or the areas designated for such solicitations were calculated to suppress free speech or the free press, the decision of the Regents that these rights could in this mannr best be accommodated upon the campus without undue disruption or interference with the educational process should not be set aside. Discretion as to what is necessary and wise in such instances should rest with the school administrators trained and experienced in such matters, not the courts. *Waugh v. Board of Trustees,* 237 U.S. 589 (1914).

Upon the foregoing principles Regents' Rule 6.11 is constitutional.

ARGUMENT

I. Plaintiffs And The Class They Represent.

Regents' contentions regarding the status and relationship of the Plaintiffs in the court below and the Defendants in the state court is relevant to all sections of their brief except the section on the merits and for this reason it is set forth as an initial section in an effort to avoid repetition.

The original Plaintiffs to this action were identical to the Defendants in the prior pending state court action. Upon allowing the filing of Plaintiffs' Amended Complaint and the joinder of additional parties Plaintiff, the court below divided the Plaintiffs into two groups, i.e., "Part A" and "Part B." It is Regents' contention that "Part A" Plaintiffs and "Part B" Plaintiffs each stood for the other in the respective phases of this litigation, and that together, by their own admission, they are members of a class which they represented. This is clearly demonstrated by resort to the pleadings and the order of the court below entered on December 17, 1969.[1] The First Amended Complaint is replete with the assertions of a class

[1]See Plaintiffs' Memorandum In Support of Motion To Amend (A. 37-39) where it is argued by Plaintiffs' counsel that the amended pleading should be filed and the joinder was proper because "obviously the causes of action asserted by all Plaintiffs raise common questions of law, and undoubtedly of fact also, as to the constitutionality of the Regents' Rules [6.11, 6.12] limiting solicitations upon the campus." Plaintiffs' counsel also urged the court to allow the amendment and joinder "to prevent a multiplicity of suits, and expedite the final determination of litigation by inclusion in one suit of all parties directly interested in the controversy." As we can now see the amendment and joiner achieved the opposite results.

action such as: the action is brought to preserve the First Amendment freedoms of "plaintiffs and the class they represent"; that "plaintiffs sue on their own behalf, and on behalf of a class composed of all students at the University of Texas at Austin who share an interest in the full enjoyment of First Amendment rights"; that the maintenance of the state court action by Regents "abridges the First Amendment rights of the plaintiffs and the class they represent"; that the Regents' Rules infringe upon the First Amendment freedoms of all those associated with the University of Texas at Austin"; that "plaintiffs and the class they represent and the public are threatened with serious and irrevocable injury."

In allowing filing of the First Amended Complaint which brought in the Plaintiffs which the court denominated as "Part B," the court found that their joinder under Rule 20(a), F.R.P.C., was proper because the "claims of all parties plaintiff to plaintiffs' first amended complaint present common questions of law and fact and that they arise out of the same series of occurrences." (A. 41). The court went on to find "that the claims of the parties plaintiff present *different procedural issues*" (emphasis added) and proceeded to split them into the "Part A" and "Part B" groups, relegated "Part A" to the prior pending state court action and leaving "Part B" in the court below.[2] It is important to note that the court found no difference in the *substantive issues* presented by the Plaintiffs, only procedural differences. Apparently the division of the class Plaintiffs into two groups was an *ad hoc* attempt by the court to resolve what it perceived

[2]The Young Socialist Alliance was allowed to later join "Part B" upon the assertion that they were a part of the class described in the Plaintiffs' First Amended Complaint and that they adopted all allegations thereof (A. 44-45, 48).

to be a dilemma created by the pending state court action. It would have better served the ends of orderly judicial processes and the purposes of the dual legal system embodied in the concept of federalism under which this country was established, if the court had merely required the members of the class who sought joinder by the amended complaint to follow their "Part A" brethren to the state court and intervene in that pending action,[5] since they presented no substantive issues different from "Part A" Plaintiffs. Instead, by its order of December 17, 1969, the court below created an unseemly anomaly by splitting an admitted class of Plaintiffs into two groups and leaving them to present claims involving the same questions of law and fact, arising out of the same occurrences, to two different courts—one a state court, the other a federal district court.[6]

II. Res Judicata.

Although the principles laid down by this Court in *England v. Louisiana Medical Examiners,* 375 U.S. 411 (1964), may not technically fall within the category of res judicata, the Regents' contentions with respect to the application of *England* to the case at hand are sufficiently related so as to be presented under this section of their brief. It was considered as a part of Regents' res judicata contentions in the opinion of the court below.

In *England v. Louisiana Medical Examiners,* 375 U.S. 411 (1964), a group of chiropractors brought an action in federal district court seeking an injunction

[5]Under Rule 60, Texas Rules of Civil Procedure, they had a right to intervene, subject only to being stricken by order of the state court.

[6]The court below finally realized the existence of this anomaly and questioned whether it had made a mistake (T. 17).

and a declaration that, as applied to them, the Louisiana Medical Practice Act violated the Fourteenth Amendment. Invoking the doctrine of abstention, on the theory that a determination by the state courts that chiropractors are not governed by the act would end the controversy, the federal district court stayed further proceedings to afford the state courts an opportunity to pass upon such issues. The federal Plaintiffs then brought proceedings in the state court and, rather than restricting those proceedings to the question of application of the Act, they unreservedly submitted for the decision of the state court, and briefed and argued, their contention that if the Act governed chiropractors it violated the Fourteenth Amendment. The Louisiana Supreme Court refused to review the lower state court decision that the Act applied to chiropractors and did not violate the Fourteenth Amendment. The chiropractors then returned to the federal district court, where the Medical Board moved to dismiss. The district court granted this motion, stating:

> ". . . since the courts of Louisiana have passed on all issues raised, including the claims of deprivation under the Federal Constitution, this court, having no power to review those proceedings, must dismiss the complaint. The proper remedy was by appeal to the Supreme Court of the United States." 194 F.Supp. at 522.

On review by this Court is was held that:

> ". . . if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review in this Court—he has elected to forego his right to return to the District Court." 375 U.S. at 419.

The Court reasoned that a party unreservedly litigating his federal claims in state court should not be

allowed to ignore an adverse decision and begin anew in federal court. If he wishes to preserve his federal claims for later determination, he must make a reservation of those claims on the state court record by informing the state court that he intends to return to federal court for a determination of his federal claims.

Although the original Plaintiffs in the present case [who were designated as "Part A" by the court below] were remanded to the state court because of the restriction imposed upon the injunctive powers of the court below by 28 U.S.C. §2283 rather than under the doctrine of absention, we see no logical reason for saying that the principles laid down by this Court in *England* would not have precluded "Part A" Plaintiffs from returning to federal district court. They unreservedly plead, argued and presented for the decision of the state court their First Amendment contentions concerning the constitutionality of Regents' Rules 6.11 and 6.12; they made no reservation of the constitutional issues upon the record in the state court.* It is submitted that "Part A" Plaintiffs could not, under *England,* have returned to the court below to litigate those issues, but that they did in fact return in guise of the "Part B" Plaintiffs to relitigate those same issues.

Of course, if the "Part A" members of the class had successfully pressed their First Amendment attack upon the Regents' Rules in the state court action, there would have been no occasion for the "Part B" class members to implore the court below to pass upon the same issues. Now, as a result of the refusal of the court below to apply the *England* principles to the

*The "Part A" and "Part B" Plaintiffs have been represented by the same counsel throughout all phases of the litigation in both courts.

situation before it, all that *England* was intended to prevent has come to fruition in this case. Regents' Motion to Dismiss should have been granted on the basis of *England.*

The judgment of the state court upon the issue of the constitutionality of Regents' Rules 6.11 and 6.12 was specifically plead by the Regents in the court below as being res judicata or an estoppel to the relitigation of those issues in the federal court. Regents theory in the application of these principles is dependent upon its contention that "Part A" Plaintiffs and "Part B" Plaintiffs are, as they themselves alleged and argued in the court below, members of the same class.

It is familiar doctrine of the federal courts that a judgment in an action to which some members of a class are parties is binding upon the other members of the class who were not parties if their interests are the same, and it can fairly be said that the class members who were parties adequately represented the absent membrs of the class in presenting the issus in which all of the class had a common interest. *Hansberry v. Lee,* 311 U.S. 32 (1940); *Montezuma Canal Co. v. Smithville Canal Co.,* 218 U.S. 371 (1910); *Schatte v. International Alliance,* 84 F.Supp. 669 (S. D. Calif. 1949), aff'd 182 F.2d 158 (9th Cir. 1950), cert.den. 340 U.S. 827; *Jefferson School of Social Science v. Subversive Activities Control Board,* 331 F.2d 76 (D.C. Cir. 1963); *McIntosh v. City of Pittsburg,* 112 Fed. 705 (Cir.Ct. W.D. Penn. 1901); see *Stout v. Lye,* 103 U.S. 66 (1881).

Gart v. Cole, 263 F.2d 244 (2nd Cir. 1959), is particularly apposite. There a state court judgment was held to bar the relitigation of the same issues in

federal court even though the federal plaintiffs had not been parties to the state court action. The federal court was compelled to give the state court judgment this effect because the federal Plaintiffs were members of the class represented in the state action; they had ample notice of the action; the parties in state court had no interest contrary to the federal plaintiffs; and the same counsel that represented the state court parties represented the federal plaintiffs.

Regents submit that the facts of this case present all the elements necessary for the application of the principles set forth in the foregoing authorities. Yet the court below decided that it was not required to follow those precedents for two reasons.

First, it was noted by the court below that the judgment of the state court merely granted a temporary injunction and therefore could not be the basis of res judicata, citing *Miers v. Brouse,* 153 Tex. 54, 271 S.W. 2d 419 (1954). But, the court below ignored the Texas court authorities which clearly hold that a temporary injunction judgment can be final for purposes res judicata where the ultimate and controlling issues forming the basis of the action or defense are put in issue and passed upon by the court in its judgment granting temporary injunction.* *Wilson v. Abilene Ind. Sch. Dist.,* 204 S.W.2d 407 (Tex. Civ. App. 1947, error ref. n.r.e.); *Daniel v. Kittrell,* 188 S.W.2d 871 (Tex. Civ. App. 1944, no writ); see: *Hayden v. City of Houston,* 305 S.W.2d 798 (Tex.Civ.App. 1958, error

*This is not to say that having failed to appeal the temporary injunction judgment, the appellees can never have the issues decided by the trial court reviewed by the Texas appellate courts. The temporary injunction judgment may still be reviewed by filing a motion to dissolve in the trial court and appealing the action taken on their motion pursuant to Rule 385, Texas Rules of Civil Procedure, and Article 4662, Vernon's Texas Civil Statutes.

ref. n.r.e.); *Furr's, Inc. v. United Specialty Advertising Co.*, 385 S.W.2d 456 (Tex.Civ.App. 1964, error ref. n.r.e.). In citing these cases as controlling upon the issue of the res judicata effect of the judgment entered by the state court, Regents would point out that *Miers v. Brouse,* 153 Tex. 54, 271 S.W.2d 419 (1954), states the general rule concerning the res judicata effect of temporary injunctions, but the cases cited above establish the exception to the general rule. Resort to the opinion of the Court of Civil Appeals in *Miers v. Brouse* (reported at 261 S.W.2d 734) shows that the ultimate and controlling issue in that case concerned the ownership of a fund of money. Ownership of the fund was not presented to or decided by the court on the temporary injunction hearing—the court merely enjoined the party in possession of the fund from disposing of it pending determination of the ultimate issue of ownership. The statement in *Miers v. Brouse* is inapposite. Therefore, the court below was required to give the judgment of the state court the same res judicata effect that it was entitled to in the courts of the State of Texas. *Oklahoma Packing Co. v. Oklahoma G. & E. Co.,* 309 U.S. 4 (1939); *Caterpillar Tractor Co. v. International Harvester Co.,* 120 F.2d 82 (3rd Cir. 1941).

The principle of giving res judicata effect to temporary injunction judgments is not foreign to the federal court system.

> "We are committed to the rule that for the purpose of the doctrine of res judicata an interlocutory decree, affirmed on appeal, 'which in fact finally determines the issues presented by the pleadings and settles the controversies over the subject-matter involved, is sufficiently final to determine other litigation between the same parties respecting the same issues, regardless of the fact that it may be

> in legal nomenclature termed an interlocutory decree, . . .' and 'Final' as used by the courts when dealing with the subject of res judicata, is not to be determined by adjective terms."

Sewerage Commission v. Activated Sludge, Inc., 81 F.2d 22 (7th Cir. 1936), at page 23. The effect of a judgment as res judicata is not affected by the fact that an available appeal of the judgment was not taken. *United States v. Munsingwear*, 340 U.S. 36 (1950).

Secondly, the court below rationalized that the class in the state court was never any larger than those associated in distributing "The Rag," while the larger federal court class was never in the state court and therefore could never be bound by that judgment. In reaching this conclusion the court below closed its eyes to every pleading, every brief, every order and every legal precedent before it. Both the state court and the federal court, and everyone before them, knew that "Part A" Plaintiffs and "Part B" Plaintiffs were part and parcel of the same class; that their interests in challenging the Regents' Rules were identical; that the issues presented by them to the two courts were the same. The very order which created the two portions of the class belies the contention that they were not members of the same class or that they were not each representative of the other in the two courts. They were not given their alphabetical designation because of any substantive or factual difference in their claims, but because of some yet undisclosed procedural difference perceived by the court below.

It would seem certain that had the court below rendered its judgment first and had concluded that Regents' Rules 6.11 and 6.12 did not abridge First Amendment rights, that judgment would have been binding on "Part A," "Part B" and every member of the class

they represented. Having been joined together by order of the court pursuant to Rule 20(a), F.R.C.P., and never having been separated for substantive purposes, all would be bound by such a judgment. *Snyder v. Harris,* 394 U.S. 332 (1969). Further, having plead and tried their claim under Rule 23, F.R.C.P., as a class action, "Part A" and "Part B" admittedly being part of the class, it is clear that the judgment would bind all members of the class except those who had asked to be excluded. Wright, *Law of Federal Courts,* 2nd Edition, §72, p. 311, 314. This would be true even though the members of the class are linked only by common questions of law and fact. Id., at 315.

"Part A" and "Part B" were never declared to be two separate classes, merely groups within the same class. Under the cited decisions and the facts, the court below was required by the full-faith-and-credit clause to give the state court judgment effect as a bar to the relitigation by "Part B" of the issues decided by that judgment, *American Surety Co. v. Baldwin,* 287 U.S. 156 (1932); *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1943), and dismiss the action.

III. *The Judgment Was Prohibited by 28 U.S.C. §2283 and Is Unsupported by Facts Warranting Equitable Relief.*

The policy which prohibits a federal court granting an injunction to stay proceedings in state court has its origins in a statute enacted by Congress in 1793. It is presently embodied in 28 U.S.C. §2283 which reads as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The Plaintiffs' First Amended Complaint specifically recites the fact of the pending state court action to enforce the provisions of Regents' Rules 6.11 and 6.12; it prays for a declaratory judgment that such rules violate Plaintiffs' First Amendment rights and for an injunction restraining the Regents "and those acting under its direction and control, from further attempts to enforce the . . . rules and regulations, either by maintenance of state court injunctive action, disciplinary proceedings or in any other improper manner." (A. 29-30). The judgment entered by the court below permanently enjoins "Defendant Board of Regents of the University of Texas System, and all of the Defendant's agents, servants, employees and attorneys and all other persons in active concert or participation with them from further enforcement against the Plaintiffs of Article 6.11 and Article 6.12 of the Rules and Regulations of the Board of Regents of the University of Texas System." (A. 177).

The fact that 28 U.S.C. §2283 prohibited the court below from entering any order which would have the effect of a stay of the state court proceedings was consistently brought to the attention of the court by the Regents' pleadings (A. 10, 49, 100).

Although the injunction entered is directed only at the Regents and those acting at their direction, there can be no doubt that it prohibits any steps to have the pending state court action set down for a hearing on the merits and the temporary injunction made permanent. It also prohibits any action by the Regents to have the state court enforce its temporary injunction. Therefore, its effect is *to stay proceedings in a state court.* It is well settled that 28 U.S.C. §2283 "cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed

proceeding." *Atlantic Coast Line R. Co. v. Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 1743, 26 L.Ed.2d 234, 241 (1970); *Oklahoma Packing Co. v. Oklahoma G. & E. Co.,* 309 U.S. 4 (1940); *Hill v. Martin,* 296 U.S. 393 (1935).

Any contention that the anti-injunction statute is merely a technical rule, not binding on federal courts, or that in some circumstances state court proceedings may be enjoined other than under the justification of the three exceptions contained in §2283, has been squarely rejected by this Court.* This Court has twice stated: "This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." *Atlantic Coast Line R. Co. v. Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 1743, 26 L.Ed.2d 234, 241 (1970); *Amalgamated Clothing Workers v. Richman Brothers,* 348 U.S. 511, 515-516 (1955). The federal courts are powerless to enlarge upon these exceptions.

> ". . . a federal court does not have inherent power to ignore the limitations of §2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is."

Atlantic Coast Line R. Co. v. Engineers, supra, 90 S. Ct. at 1747, 26 L.Ed.2d at 245. The reason for 28 U.S.C.

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*This Court has also engrafted an exception where a person about to be prosecuted under a state criminal statute can show that he will suffer irreparable damages if the state court proceeding is not enjoined. *Ex parte Young,* 209 U.S. 123 (1908).

§2283 is founded upon the "constitutional independence of the States and their courts," and proceedings before such courts "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." Id., 90 S.Ct. at 1743, 26 L.Ed.2d at 241. "The explicit wording of §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion." Id., 90 S.Ct. at 1748, 26 L.Ed.2d at 246. Even where an injunction against state proceedings would be proper under general equitable principles, it can only be sustained where it is based upon one of the three exceptions to §2283. Id., 90 S.Ct. at 1743, 26 L.Ed.2d at 241. The grant of limited jurisdiction to federal courts by Congress is evidence of faith in the ability of state courts to protect federal rights and 28 U.S.C. §2283 is an explicit Congressional expression of that faith. *Amalgamated Clothing Workers v. Richman Brothers,* 348 U.S. 511, 518 (1954).

The injunction of the court below does not purport to come within any of the exceptions to 28 U.S.C. §2283, therefore it falls within the plain interdiction of that statute and cannot be sustained. Any contention that the injunction of the lower court was authorized by §2283 because it was to "protect or effectuate its [declaratory] judgment" is precluded by the decision in *Samuels v. Mackell,* 400 U.S. —, 91 S.Ct. 764, 27 L. Ed. 2d 688 (1971). That case teaches us that in situations where an injunction would be improper under the settled principles of equity or because of policy limitations imposed upon such relief, declaratory judgment is also improper. One of the reasons advanced for this conclusion is the fact that the Declaratory Judg-

ment Act authorizes the district court to enforce judgments entered under that Act by granting "further necessary or proper relief." Consequently, in cases where 28 U.S.C. §2283 prohibits the issuance of an injunction to stay proceedings in a state court, "a declaratory judgment issued while state proceedings are pending might serve as a basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 U.S.C. §2283, and thus result in a clearly improper interference with the state proceedings." Id., 91 S.Ct. at 767-768, 27 L.Ed.2d at 693. Although the state court proceeding in *Samuel v. Mackell* was a criminal prosecution, the holding of the Court is based squarely upon the rule announced in prior cases involving civil proceedings. Just as the Court could "perceive no relevant difference between the two situations" there, we see none here. And surely the same civil cases relied upon by the Court in *Samuels v. Mackell* require that the same principles be applied in the case at bar.

Wholly aside from the prohibition of 28 U.S.C. §2283, the record in this case does not present, by way of either allegation or proof, facts which would warrant the exercise of the equity powers of a federal court to grant either injunctive or declaratory relief against a state court proceeding to enforce Regents' Rules 6.11 and 6.12.

In a series of decisions handed down by this Court on February 23, 1971, the tendency of the federal district courts to grant injunctive relief against pending state court prosecutions with ever increasing frequency and latitude under the umbrella of *Dombrowski v. Pfister,* 380 U.S. 479 (1965), was sharply curtailed. On that date this Court pointed out in *Younger v. Harris,* 400 U.S. —, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971),

that the concept of "comity" and the principles of "Our Federalism" require respect for the "belief that the National Government will fare best if the States and their separate institutions are left free to perform their separate functions in their separate ways." Id., 91 S.Ct. at 750-751, 27 L.Ed. 2d at 675. Relying upon this premise the Court held that federal district courts are warranted in granting injunctive relief against pending state court criminal prosecutions only where it is shown that *both great and immediate irreparable injury* will occur as a result of the prosecution.

> "Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense of a single criminal prosecution." Id., 91 S.Ct. at 751, 27 L.Ed.2d at 676-677.
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> "Moreover, the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." Id., 91 S.Ct. at 754, 27 L.Ed.2d at 679.
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> "Just as the incidental 'chilling effect' of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and constitution." Id., 91 S.Ct. at 754, 27 L.Ed.2d at 680.
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> ". . . the possible unconstitutionality of a statute 'on its face' does not in itself justify an in-

> junction against good faith attempts to enforce it, and . . . appellee Harris has failed to make any showing of bad faith, harrassment, or any other unusual circumstance that would call for equitable relief." Id., 91 S.Ct. at 755, 27 L.Ed.2d at 681.

These principles were followed and held to prohibit either the grant of injunctive or declaratory relief in: *Byrne v. Karalexis,* 400 U.S. —, 91 S.Ct. 777, 27 L.Ed. 2d 792 (1971); *Dyson v. Stein,* 400 U.S. —, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971); *Boyle v. Landary,* 400 U.S. —, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); *Samuels v. Mackell,* 400 U.S. —, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); *Perez v. Ledesma,* 400 U.S. —, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971).

Upon reflection, we can perceive of no logical reason why the longstanding policy of "comity" and "Our Federalism" which compelled this Court to lay down the rule followed in *Younger v. Harris* and its progeny, becomes any less compelling simply because a federal court is asked to enjoin a pending state court civil action brought to enforce a state statute rather than a pending criminal prosecution. In both instances the same disruption and the same interference with orderly state procedures occur regardless of the label assigned to the state court proceeding. If the caveat contained in these opinions means that the restrictions upon the exercise of the powers of equity to grant injunctive or declaratory relief with regard to pending civil proceedings in state court is any less stringent than in *Younger v. Harris,* then we are met with a dilemma. Many penal statutes not only provide for criminal sanctions, but in addition allow civil proceedings to enjoin conduct which violates the penal statute. Therefore, resort to the labels of "civil" and "criminal" as a guidepost for the application of the principles of *Younger v. Harris* would result in the strange

anomaly of making the federal district court's authority to either grant or withhold equitable relief in a given factual situation wholly dependent upon whether the statute is being enforced in a civil or a criminal proceeding. Judicial logic cannot justify such a result.

Reason compels that the *Younger v. Harris* rule for granting equitable relief be applied to the case now before this Court.

The Complaint alleged that Plaintiffs and their class will suffer "serious and irrevocable" injury if not granted declaratory and injunctive relief; that they lack a "plain, adequate or complete remedy"; that any remedy other than that requested "would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits; [and] would impose upon the plaintiffs deprivations of their First Amendment freedoms." (A. 29). These are bare bone allegations unsupported by any facts in the record.

There is no showing that litigating the constitutional issues regarding the Regents Rules in the single pending state court action and pursuing an appeal to this Court will not afford the plain, adequate or complete protection of the federal rights involved. There is no showing that our Texas courts are unmindful of or incapable of protecting those rights.

The alleged uncertainties and delays attendant to the state court procedures are wholly unidentified in the Complaint, and the record is silent as to what they are. The only delays to date have been occasioned by this appeal to the federal court for relief. The same holds true of the allegation of a multiplicity of suits. Regents have brought only one court action and have

threatened no others. Multiplicity was occasioned by Appellees.

As to any deprivation of First Amendment freedoms, the record presents nothing more than the bare "chilling effect" which is always present in a statute which regulates conduct associated with First Amendment freedoms. There is no showing that unless the requested relief is granted there is a great and immediate danger that Appellees' newspaper and publication ventures will perish as a result of restricting their place of sale to the areas designated under the rule, or that Appellees' political organizations will dwindle and die if dues can be solicited only in the manner prescribed by the Regents.

The record contains no suggestion that the Regents brought the state court action in bad faith or that it is but one of a series of harrassing actions designed to suppress the exercise of Appellees' constitutional rights. In short, Appellees have failed to show any of the factors necessary under *Younger v. Harris,* and its companion cases, to justify the declaratory or injunctive relief granted by the court below.

IV. *Regents' Rule 6.11 Is a Permissible Regulation of Conduct Associated With First Amendment Rights.*

Regents submit that under the principles and authorities presented in the foregoing sections of this brief, the court below was wholly unauthorized and unwarranted in granting the relief contained in its opinion and judgment. For those reasons the judgment of the court below should be reversed and the case remanded with orders to dismiss. But, in the sole event that this Court does not agree with Regents contentions in that regard, the following argument concerning the

validity of the Regents' Rules is presented for the consideration of this Court. Regents, upon the record, make the express reservation that in the event this Court reverses and remands this case without consideration of the merits, nothing contained in this portion of their brief will be binding upon the Regents in the pending state court proceedings nor will it prevent or preclude the Regents from making additional or different arguments concerning the validity of their rules in such state court proceedings.

At the outset it must be recognized that this Court has on many occasions stated that First Amendment rights are not absolutes. Conduct upon public owned property open to the general public may be constitutionally regulated as to time, place or manner, even though that conduct is inextricably entwined with First Amendment freedoms, when the purpose of the regulation is to preserve order and protect the public in the use of the property. *Walker v. Birmingham,* 388 U.S. 307 (1967); *Cox v. Louisiana,* 379 U.S. 536 (1965); *Poulos v. New Hampshire,* 345 U.S. 395 (1952); *Kovacs v. Cooper,* 336 U.S. 77 (1948); *Cox v. New Hampshire,* 312 U.S. 569 (1941); *Cantwell v. Connecticut,* 310 U.S. 296 (1939); *Schneider v. Irvington,* 308 U.S. 147 (1939). These cases recognize that even though First Amendment freedoms are incidentally curtailed by such regulations, they are valid if they further a substantial governmental interest and their application is not subject to the arbitrary discretion of a public official. Perhaps the rule has best been stated by the Court in the following language:

> ". . . when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment rights.

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms; compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

United States v. O'Brien, 391 U.S. 367, 376-377 (1968). And, as this Court has often observed, the application of this test places upon the Court the "delicate and difficult task . . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." *Talley v. California,* 362 U.S. 60 (1960); *Breard v. Alexandria,* 341 U.S. 622 (1950); *American Communications Assoc. v. Douds,* 339 U.S. 382 (1949); *Thornhill v. Alabama,* 310 U. S. 88 (1940); *Schneider v. Irvington,* 308 U.S. 147, 161 (1939).

Where public property is not dedicated to the use of the general public, but is instead set aside and preserved for the limited purpose of carrying out a governmental function, the government has an unquestioned legitimate interest in preserving that property for its intended use. *Tinker v. Des Moines Community School Dist.,* 393 U.S. 503 (1969); *Cameron v. Johnson,* 390 U.S. 611 (1968); *Adderly v. Florida,* 385 U.S. 39 (1967); *Cox v. Louisiana,* 379 U.S. 559, 562 (1965). "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderly*

v. Florida, supra, at 47. These cases teach that conduct mixed with speech may constitutionally be prohibited or regulated as to time, manner and place, where such conduct unreasonably interferes with the dedicated purpose of property.

With these principles in mind we approach the constitutional barrage leveled at the Regents' Rules.

The court below rightfully recognized that the Regents' interest in preventing substantial disruption of the educational processes of the institutions under its control furthered a "compelling" state interest which "justifies some reasonable regulation." (A. 170). However, that court went on to find that Regents' Rules 6.11 and 6.12 were invalid because first, they vested standardless discretion in University officials to either grant or withhold permission to exercise First Amendment rights, (A. 172), and secondly, they are overbroad in that they "broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (A. 171).

Insofar as Rule 6.12 vests in the institutional head the power to approve "solicitation or fund-raising for the needy or suffering, relief of the poor, or for public benevolent purposes" (A. 32), Regents admit that such Rule is tainted with those qualities of censorship and discretionary licensing power which were condemned by this Court in *Staub v. Baxley,* 355 U.S. 313 (1958); *Largent v. Texas,* 318 U.S. 418 (1942); *Cantwell v. Connecticut,* 310 U.S. 296 (1939); *Schneider v. Irvington,* 308 U.S. 147 (1939); *Hague v. C.I.O.,* 307 U.S. 496 (1938). But, by admitting that Rule 6.12 is constitutionally unsound in this respect, Regents do not admit that they do not have the power or authority to promulgate a rule, free of these features, which

would either prohibit altogether or impose reasonable restrictions upon the campus conduct of groups of students organized and banded together for whatever purpose. *Waugh v. Board of Trustees,* 237 U.S. 589 (1914); *Webb v. State University of New York,* 125 F.Supp. 910 (N.D. N.Y. 1954) appeal dismissed for want of substantial federal question 348 U.S. 867. Recognizing the infirmity of Rule 6.12, Regents will not argue the validity of other portions of that rule.

As to the holding that Regents' Rule 6.11 also vests arbitrary discretion in the administration, that conclusion was based solely upon the language of subdivision (2) of the rule which permits "the sale of . . . any publication authorized by an agency of a component institution." Viewing this language in a vacuum, perhaps the conclusion of the court below would be justified. However, the record shows that this provision has been construed in a narrow and precise manner. The term "agency" as used in the quoted phrase means a school or division of a component institution.[7] A "component institution" is one of the universities or other facilities comprising the System.[8] The publications that are sold under the questioned language of 6.11(2) are publications of the school or division;[9] they have the prior approval of the Regents;[10] and are related to the scholarly or educational subjects of the school or division.[11] These publications are sold either by subscription or at the office of the sponsoring school or depart-

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[7]Pages 11-13, deposition of Regents' Chairman Frank C. Erwin, placed in the record as an attachment to the Affidavit (A. 68) of Appellees' counsel.

[8]Id., at 3-4.

[9]Id., at 11-12.

[10]Id., at 13-14.

[11]Appendix 132, answer to interrogatory No. 2.

ment and not upon the campus malls."[12] Therefore, as construed and applied, the questioned language, contrary to the opinion of the court below, does not confer unbridled discretion upon an administrator of The University. No one is authorized by it to permit *Newsweek* and *U.S. News & World Report* to be freely sold upon the campus while denying the same authorization to Appellees' *Rag* and *The Militant*. The manner in which that portion of Rule 6.11 has been applied and construed is a part of the rule. *Foley v. Benedict,* 122 Tex. 193, 55 S.W.2d 805 (1932). When the validity of an administrative rule or regulation is placed in question, the longstanding practice in its application should be looked to in determining the interpreation placed upon it by the agency. *Udall v. Tallman,* 380 U.S. 1 (1965). The agency's interpretation of the meaning and application of its own rules and regulations is controlling unless plainly erroneous or inconsistent with the wording of the regulation. *Immigration Service v. Stanisic,* 395 U.S. 62 (1969); *Thorpe v. Housing Authority of Durham,* 393 U.S. 268 (1969). An otherwise invalid regulation may be sustained where it has been given a narrowed and acceptable limiting construction. *Younger v. Harris,* 400 U.S. —, 91 S.Ct. 746, 753, 27 L.Ed.2d 669, 679 (1971). Consequently, as construed and applied subdivision (2) of Rule 6.11 does not suffer the constitutional infirmity assigned by the court below.

Passing to the question of whether Regents' Rule 6.11 is overly broad insofar as it restricts the sale of newspapers and publications to the areas designated on the Austin campus, it should be noted that no contention is made that the rule has been applied with

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[12]Appendix 161-162, stipulation No. 6.

other than an even hand, nor is any contention made that the rule is vague or indefinite.

The opinion of the court below finds Rule 6.11 to be overly broad because it is "unreasonably restrictive" and fails to strike "at the very evil they wish to prevent." It further finds that the Regents have not spoken "with that small calibre precision required of regulations touching first amendment rights." (A. 171). Then strangely, the court states that in holding the rule invalid it does not intend to impair the right of the Regents to prohibit activity that is disruptive of the educational atmosphere on campus. Regents submit that in essence all the court below said was: "We recognize your right to regulate the conduct of selling newspapers and publication upon the campus in order to prevent disruption of the educational atmosphere, but we do not agree with the manner in which you have gone about it." The court then suggests a number of its own alternative methods of regulation which Regents submit would present more constitutional problems then they solved and in addition would require a constant system of extensive policing for their enforcement.

The record clearly shows that as a result of the solicitation of the sale of newspapers and other publications on the campus at Austin, classroom and laboratory routine has been disrupted and students, professors and employees have been annoyed upon the campus and in dormitories. Unlike the facts in *Tinker*, here there is experience of disruption as a result of the speech connected conduct regulated by the rule. That disruptive exprience continued up until the time the Regents took action in state court to enforce their solicitation rule. Rule 6.11 is in no way directed at the content of any newspaper or publication. Also unlike

Tinker it does not single out an unpopular viewpoint for regulation while exempting the popular. In short it treats all newspapers and publications alike that are not sponsored by The University.

With all due respect to the court below, the Regents did speak to the evil they wished to prevent—disruption resulting from the solicitation of the sale of newspapers, magazines and other wares upon the campus. However, in an effort to accommodate the publishers of newspapers, magazines and other publications, Regents created an exception in the rule which would allow their sale on the campus. This could best be accomplished, in the considered judgment of the Regents and the administrators on the Austin campus, by restricting such sales to vending machines at locations upon the campus which provide suitable exposure for sales and least interference with the operation of The University processes. Courts are not to judge whether such regulations are wise or expedient but only whether they are a reasonable exercise of the power and discretion of the school authorities. *Waugh v. Board of Trustees,* 237 U.S. 589, 597 (1914); *Tinker v. Des Moines Community School Dist.,* 393 U.S. 503, 525-526, (1969) (Justice Black dissenting); *Lassister v. Northampton County Bd. of Elections,* 360 U.S. 45, 53 (1959); *Barker v. Hardway,* 283 F.Supp. 228 (S.D. W.Va. 1968) aff'd 399 F.2d 638 (5th Cir. 1968) cert. den. 393 U.S. 856; *Stevenson v. Wheeler County Bd. of Ed.,* 306 F.Supp. 97 (S.D. Ga. 1969) aff'd 426 F.2d 1154 (5th Cir. 1970) cert. den. —— U.S. ——; *Esteban v. Central Missouri State College,* 415 F.2d 1077 (8th Cir. 1969) cert. den. 398 U.S. 965; *Kuszynski v. City of Oakland,* 322 F.Supp. 689 (N.D. Calif. 1971).

For after all, in deciding how best to cope with conduct that is incompatible with an efficient and effective

educational system, who is the better equipped to make the determination of what is necessary and reasonable? The school administrators who are familiar with the physical facilities, atmosphere and operation of the system, and whose education and experience has fitted them for running such a system, or judges who may have not set foot upon the campus in recent years, if ever at all? The choice is obvious and the Constitution does not dictate otherwise. Judges may not strike down a law or regulation simply because they do not like it. *Tinker v. Des Moines Community School Dist., supra,* at 520 (Mr. Justice Black dissenting). If the decision is in that range where reasonable minds may differ then the decision of the school authorities must prevail. *Pound v. Holladay,* 322 F.Supp. 1000 (N.D. Minn. 1971). The states and their local authorities are better equipped to deal with matters of school discipline and administration than the courts. *Karr v. Schmidt,* —— U.S. ——, 91 S.Ct. 592, 27 L.Ed.2d 797 (1971) (Mr. Justice Black, Circuit Justice).

Regents' Rule 6.11 is reasonable and meets the test of this Court for regulation of speech connected conduct as summarized in *United States v. O'Brien,* 391 U.S. 367, 376-377 (1968).

Breard v. Alexandria, 341 U.S. 622 (1950), squarely sustains the Regents' Rule 6.11. There the city passed an ordinance which prohibited all solicitors and peddlers from going in and upon private residences without having been invited or requested to do so by the owner or occupant of the residence. The ordinance was enacted because various householders had complained to the city officials that some solicitors were discourteous and that uninvited solicitors were an intrusion upon their privacy. A group of door-to-door solicitors of magazine subscriptions were charged with violating

the ordinance and upon conviction urged that the ordinance violated the Fourteenth Amendment Due Process Clause, the Commerce Clause and First Amendment freedom of speech. The ordinance was sustained by this Court. Several of the statements of the Court in that opinion seem strikingly appropriate to the case at hand.

> ". . . opportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose. This case calls for an adjustment of constitutional rights in the light of the particular living conditions of the time and place. Everyone cannot have his own way and each must yield something to the reasonable satisfaction of the needs of all." Id., at 626.

The publishers of newspapers and magazines sold by solicitors are no more free to violate regulations designed to protect private rights than are other type solicitors. Id., at 637. Simply because they cannot make as much money by the solicitation methods left open to them does not present a constitutional objection. Id., at 638. While the fact that money is made from the sale of the publications does not remove them from the protection of the First Amendment, nonetheless that protection does not mean that those who distribute them may do so how, when and where they choose. Id., at 642.

And finally, paraphrasing the conclusion of the Court at 644-645:

> "This makes the constitutionality of [Regents' Rule 6.11] turn upon a balancing of the conveniences between [Regents] desire for [maintaining

an undisturbed educational facility] and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best result.

". . .

"[Purchases] may be made by anyone interested in receiving the [publications] without the annoyances of [building to building and person to person] canvassing. We think those [school administrators] that have found these methods of sale obnoxious may control them by [Rules]. It would be, it seems to us, a misuse of the great guarantees of free speech and free press to force a [university] to admit the solicitors of publications to the [buildings and malls of its campus]. We see no abridgment of the principles of the First Amendment in this [Rule]."

Breard v. Alexandria, supra, is particularly appropriate because *Adderly v. Florida,* 385 U.S. 39, 47 (1967), likens state property dedicated to a special use to the property of a private owner.

Kuszynski v. City of Oakland, 322 F.Supp. 689 (N.D. Calif. 1971), is also apposite. There the board charged with governing a municipal airport terminal enacted a regulation to control commercial and noncommercial solicitation within and around the terminal. The regulation limited commercial and noncommercial solicitation to specified areas; restricted the length of time for such conduct and the number of persons who could participate. Kuszynski and others who wished to distribute newspapers and handbills critical of the military and the Vietnam policy challenged the ordinance as being an impermissible restraint upon the exercise of First Amendment rights and an impermissible delegation of power to the airport manager to determine what literature might be distributed. With regard to

the restrictions upon time and manner of distribution, the court observed that Oakland had a right to operate the terminal in "an uncrowded, uncontentious, pleasant, edifying, non-obscene, non-controversial manner"; that the general traveling public has a "right not to have their private thoughts intruded upon, and to be free of harrassment, controversy and humiliation"; that while "plaintiffs and others have the right to freely express their ideas. Unfortunately, all of these rights cannot, without limitation, exist side by side." Id., at 691. Noting that the restrictions that may be imposed upon the dissemination of newspapers and periodicals vary from circumstance to circumtance and that the extent of the restrictions which may be imposed upon these activities on property open generally to the public is quite different from those permissible upon private or public property devoted to a specific purpose, the court sustained the regulation and, in language particularly appropriate to the situation presented by Regents' Rule 6.11, stated:

> "The airport manager has a job to do and that is to make the airport as efficient, attractive and inviting a facility as is possible. He has responsibility to the plaintiffs, but it is secondary. He must permit them to exercise their rights of free speech in as broad a fashion as is possible without interfering with his primary job, the running of the air terminal. . . . it appears that the restrictions imposed are entirely reasonable. Under the ordinance there is permitted a wide latitude of distribution over many areas of the facility. All restrictions appear reasonable (sic) related to the nature and use of the air terminal and justified under the circumstances." Id., at 692.

See also: *Valentine v. Chrestensen,* 316 U.S. 52 (1942).

There is no showing that the Austin campus has been opened to the use of the public in general as in

Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968); *March v. Alabama,* 326 U.S. 501 (1946); *Tucker v. Texas,* 326 U.S. 517 (1946); *Wolin v. Port of New York Authority,* 392 F.2d 83 (2nd Cir. 1968), cert. den. 393 U.S. 940. In fact, The University administration has specific statutory authority to refuse the entry of any person with no legitimate business upon any property under its control. §9, Article 2919j, Vernon's Texas Civil Statutes. Also, contrary to the Appellees' contention, the malls of the Austin campus have not been maintained as a traditional free speech area."

Lastly we turn to the Appellees' contention that Rule 6.11 unconstitutionally discriminates against them. While it is true that the Rule 6.11 contains classifications of different types of permissible solicitation, all within a given classification are treated equally. Each classification is of a separate and distinct character, based upon logical differences in the type of solicitation involved. They are not based upon irrelevant or capricious considerations nor are the lines drawn upon the basis of wealth, race or conditions deemed invidious. Absent these factors, the classifications may rest upon any reasonable basis that can be conceived. *McDonald v. Board of Election Com. of Chicago,* 394 U.S. 802, 807-808 (1969); *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 668 (1966); *Lassister v. Northampton County Bd. of Elections,* 360 U.S. 45, 51-52 (1959). The classifications are subject to none of these defects.

The only distinction between categories of permissible solicitation of which Appellees could possibly com-

"Affidavit of Edwin B. Price (A. 159). This contention is further refuted by the fact that a large area is maintained for purposes of free speech (A. 159, 162), which would be unnecessary if the malls were free speech areas.

plain is that established by subdivisions (2) and (4) of Rule 6.11. But here again, the distinction is not without reason and logic. The publications authorized for sale under subdivision (2) are publications of The University or its subdivision. They are authorized and used to either further the educational function of The University and its departments or to provide a service to the student community as a whole. Subdivision (4) restricts the sale of all other newspapers and publications to the prescribed areas. This classification includes all non-university sponsored publications. Surely the fact that The University chooses to publish, and either sell or distribute upon *its own property,* material that is calculated to further the educational purposes to which that property is dedicated, does not mean that the Fourteenth Amendment or any other provision of the Constitution requires that every other purveyor of printed material be allowed to roam the campus at will, or even be accorded the opportunity to sell their wares at the same places The University chooses to sell its own publications. Neither reason nor the Constitution dictate that result.

The real issue presented by this case is not one of discrimination, either in the rule itself or the manner in which it is enforced. Neither is it whether there is a denial of the right of free speech or free press. It is rather, a conflict between students and duly constituted school officials over who is the better qualified to say where, when and how the sale of newspapers and other publications may best be accommodated upon the campus without disruption and offense to the maintenance of an ordered educational atmosphere. The record shows that numerous newspapers are regularly sold at the designated areas on the campus. There is nothing to show that these areas are calculated to discourage

sales of the newspapers or that they were not selected with complete fairness and good faith on the part of the school officials.

> "There seems to be a tendency in this country —and it is especially prevalent among students— toward the view that if one only believes strongly enough that his cause is right, then one may use in advancing that cause any means that seem effective at the moment, whether they are lawful or unlawful and whether or not they are consistent with the interests of others. The law, of course, cannot and does not take that position, and those who do must not expect to receive substantive protection from the law; to the contrary, they must expect to be punished when they violate laws and college regulations which are part of a system designed to protect the rights and interests of all."

Scott v. Alabama Board of Ed., 300 F.Supp. 163, 168 (N.D. Ala. 1969). See *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 525-526 (1969) (Mr. Justice Black dissenting).

CONCLUSION

For the reasons stated herein the judgment of the court below should be reversed and the cause remanded with instructions to enter an order of dismissal. In the alternative, upon the merits, that portion of the judgment of the court below holding Regents' Rule 6.11 to be unconstitutional should be reversed and judgment here rendered sustaining the validity of such rule.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

ALFRED WALKER
Executive Assistant Attorney General

J. C. DAVIS
Assistant Attorney General

PAT BAILEY
Assistant Attorney General

JAMES C. McCOY
Assistant Attorney General

W. O. SHULTZ II
Assistant Attorney General

Counsel for Appellant

P. O. Box 12548, Capitol Station
Austin, Texas 78711

Of Counsel:

RICHARD C. GIBSON
Law Office Director
University of Texas System

CERTIFICATE OF SERVICE

I, W. O. Shultz II, one of the attorneys for the Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of May, 1971, I served three copies of the foregoing Brief of Appellant together with three copies of the Appendix in this cause, upon the Appellees by depositing same in the United States Mail, postage prepaid, and addressed to Appellees' attorney of record as follows: David R. Richards, 205 AFL-CIO Building, 308 West 11th Street, Austin, Texas 787

W. O. SHULTZ II

Supreme Court, U.S.
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JUL 19 1971
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-55

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM,

Appellant,

—v.—

NEW LEFT EDUCATION PROJECT, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

BRIEF FOR APPELLEES

DAVID R. RICHARDS
CLINTON & RICHARDS
600 West 7th
Austin, Texas 78701
Attorneys for Appellees

MELVIN L. WULF
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, N. Y. 10010
of Counsel

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